RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 10 2014
OFFICE OF THE CLERK

No. 142, Original

In The Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff,

v.

STATE OF GEORGIA,
Defendant.

SUPPLEMENTAL BRIEF FOR FLORIDA

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ARGUMENT

Florida submits this supplemental brief in response to Georgia's intervening brief.[1]

1. Despite renewing its erroneous (*see* U.S. Br. 15) argument that Florida has not adequately pleaded injury, Georgia does not seriously challenge Florida's lead argument—backed by the Solicitor General—that "Florida's complaint states a claim that fits squarely within this Court's original jurisdiction." *Id.*; Fl. Supp. Br. 2-3. Instead, Georgia focuses its arguments on its contention that this action should not "go forward until, at a minimum, the Army Corps of Engineers issues its revised [Manual]"—years from now. Ga. Supp. Br. 1. Georgia's arguments are unpersuasive. As the first footnote of its brief underscores, Georgia is simply seeking to delay an adjudication of Florida's equitable share of the waters at issue for as long as it can. The Court should not condone that effort.

2. Georgia argues (at 2) that Florida "overlooks" the distinction between the *harm* it is suffering and the *claims* it has advanced to redress those harms. That argument should be rejected.

Georgia concedes (at 3) that "the Corps cannot apportion the ACF system"—the relief that Florida seeks through this action. Yet Georgia argues (at 3) that this action should not be allowed to proceed because the revised Manual will establish "a new minimum flow at the Georgia-Florida border" that

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[1] On October 8, 2014, Florida filed a supplemental brief responding to the United States' amicus brief (only). Georgia—after receiving service of Florida's brief—filed a supplemental brief the following day, responding to both the United States' amicus brief and Florida's supplemental brief.

could "eliminate[] or mitigate[] Florida's alleged injury." This argument is a sleight of hand. It is true that water flows in the ACF system from Georgia to Florida through the Lake Seminole reservoir and Jim Woodruff Dam. But Woodruff is a pass-through facility; it has "only very limited storage" capacity.[2] The problem necessitating this action is Georgia's overconsumption of waters *before* they enter the Corps' reservoirs. Water that Georgia over consumes upstream on the Chattahoochee or the Flint Rivers cannot make it to Florida—no matter how the Corps tinkers with its flow rates.

The Solicitor General recognized the disconnect between the operation of the Corps' reservoirs and the harms inflicted by Georgia's over consumption of waters when he urged the Court to deny certiorari in the *Tri-State Water Rights Litigation*. That action involved the Corps' operation of the Buford Project

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[2] *See* U.S. Army Corps of Engineers, *Final Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the ACF River Basin, in Alabama, Florida, and Georgia*, at 5 (Mar. 2013), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/1ACF%20Scoping%20Report_Mar2013.pdf (noting that the "Jim Woodruff Dam/Lake Seminole [is] operated as a run-of-river project[]" and has "only very limited storage"); U.S. Fish & Wildlife Service, Panama City Field Office, *Biological Opinion on the U.S. Army Corps of Engineers, Mobile District, Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River*, at 7 (May 22, 2012), *available at* http://www.fws.gov/southeast/news/2012/pdf/woodruffBOFinal.pdf. (recognizing that "Lake Seminole has very limited storage capacity" and is "essentially operated as [a] run-of-river reservoir[] (*i.e.*, what goes in comes out without being stored for any substantial amount of time)"); *id.* ("releases from Woodruff Dam reflect the downstream end-result" of the water system).

near Atlanta. As the Solicitor General argued, readjusting the operation of the Buford Project "would not necessarily prevent the economic and environmental harms Alabama and Florida" complained about, because "Georgia would still be able to withdraw the water it seeks, depriving Alabama and Florida of flows downstream." *Florida v. Georgia*, No. 11-999, Opp. for Fed. Resps. 31. That is exactly the problem here.[3]

3. Georgia also attacks (at 4-5) Florida's arguments concerning the common-sense path forward that the Solicitor General has proposed for avoiding any potential interference with the manual revision process—simply structuring the litigation to avoid any such interference. U.S. Br. 22-23. But once again, Georgia's response is unpersuasive.

To begin with, Georgia does not dispute, nor could it, that equitable apportionment actions typically take several years, if not a decade or more, to litigate. Fl. Supp. Br. 9. There is no reason why the initial phases of this litigation cannot be conducted while the manual revision process is being completed—and, conversely, no reason to make Floridians wait three or more years until the final

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[3] Georgia cites (at 3) *Mississippi v. City of Memphis*, 559 U.S. 901 (2010), and *Arizona v. California*, 283 U.S. 423 (1931). But in *Mississippi*, the Court did not issue a decision, and the footnote cited from *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003), simply acknowledges the equitable-apportionment doctrine. And in *Arizona*, it was conceded that there was no "present" interference with the enjoyment of water rights at the time of the action was brought. 283 U.S. at 460. Here, Florida has adequately alleged *present and ongoing* violations of its rights to an equitable share of upstream waters.

Manual is expected to be released, before even *commencing* the initial phases of this case.

Georgia takes issue (at 5) with the suggestion (Fl. Supp. Br. 10) that discovery could be conducted concerning the Flint River, claiming that such discovery would necessarily impact Corps' operations on the Chattahoochee. Not so. Discovery could commence on such matters as the location, size, and use of private reservoirs on the Flint; the historical volumes of water used for municipal and industrial purposes on the Flint; the planned future municipal and industrial growth on the Flint; the historical pumping amounts and location of irrigation uses on the Flint; whether Georgia has developed conservation plans for the Flint Basin; the types of water distribution systems on the Flint; and so on. None of these areas would implicate or interfere with the manual revision process for the Corps' facilities on the Chattahoochee River.

Georgia back tracks from its initial request for an opportunity "to file a prompt motion to dismiss the complaint" (Opp. 31 n.20), and now says that it would be "premature" to entertain a motion to dismiss. But that flip-flop is just opportunistic. Once Florida's action is allowed to go forward, Georgia will undoubtedly file a motion to dismiss on legal grounds (as it indicated it would) and there is no reason to postpone the adjudication of such a motion. Georgia's arguments that Florida might not be able prove harm as an *evidentiary* matter would provide no reason to dismiss the complaint *as a matter of law*. The question on a motion to dismiss would be whether Florida's complaint—accepting the allegations as true, *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009)—fails to state a claim. There is no reason to postpone consideration of such a threshold motion.

Georgia claims (at 6 n.2) there is "no precedent" for structuring an action in this fashion. But courts and special masters are well-accustomed to phasing litigation and well-positioned to do so. And what is truly unprecedented is the notion that this Court would take a case that "fits squarely" within its original jurisdiction and that sufficiently alleges substantial harms (U.S. Br. 15), and either dismiss the action or put it on hold for a period of three years or more—while the harms persist, and worsen.

4. Georgia also takes another stab at arguing that Florida has failed adequately to allege an injury and belittles Florida's averment that the "'situation is dire.'" Ga. Supp. Br. 7 (quoting Fl. Compl. ¶60). As the Solicitor General has explained (at 15), however, Florida's complaint adequately alleges harm. That includes grave harms to the Apalachicola Basin's environment, ecology, and economy. Fl. Supp. Br. 3-5. Georgia goes even further and argues (at 8) that *Florida itself* is to blame for the situation it now faces. But Georgia has a selective memory of how the States got to this point. *See* U.S. Br. 3-8. And, in any event, Georgia is just arguing the merits. It is time to appoint a special master and allow this important and overdue action to proceed.

CONCLUSION

The Court should grant Florida's motion for leave to file its Complaint, appoint a special master, and advise the special master to conduct the proceedings in a way that minimizes potential interference with the manual process.

Respectfully submitted,

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OCTOBER 10, 2014